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Wisconsin Drainage Law

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One of the most fruitful sources of income for attorneys during recent years, especially those residing in counties having swamp and overflowed lands, has been the organizing of drainage districts, and the litigation arising therefrom.

Drainage laws are contrary to the fundamental rule, that a man's property cannot be taken from him unless for the benefit of the public. This rule is so firmly established in this state that its infringement, directly or indirectly, gives rise to endless litigation. The administration of the drainage law is a typical example, for by its provisions men have not only been compelled to surrender their lands for the purpose of draining other lands about them, but have been forced to pay large amounts in special taxes in addition. In 1891 the legislature of the state of Wisconsin passed the first drainage law. This law was declared unconstitutional by our supreme court for the reason that the public health or welfare was not involved.

(*Theresa Drainage District,* 90 Wis. 301.)

After the decision in this case the law was amended to meet the defect and in 1899 the first drainage district, known as the Little Yellow Drainage District, was organized in Juneau County, Wisconsin. Our Supreme Court held this law constitutional.

(*Stone vs. Little Yellow Drainage District,* 118 Wis. 388.)

Since the organization of the Little Yellow Drainage District probably fifty districts have been established throughout the state, embracing over one-quarter million of acres, and almost every session of the Supreme Court passes upon some phase of the drainage law.

In the beginning the drainage law was very crude. A petition with the requisite number of signers was presented to the Circuit Court and on the hearing of said petition all questions were immediately decided by the court and an attorney had to be prepared to meet every conceivable objection that might be raised. As additional districts came into being and more and more decisions affecting districts were handed down, changes in the law were made until in 1919 by Chapter 557 the law was entirely

re-codified and amended. Today many of the previous rulings and decisions are obsolete and many new questions and controversies are bound to arise.

The present law divides drainage proceedings into three steps, or hearings.

First—The signatures of the necessary number of signers to a petition of a district must be secured (Section 1379-11). When this petition is presented the only thing the court passes on is the question of the sufficiency of the number of signatures.

Second—If the petition is found to be sufficient, three commissioners are appointed, who, after qualifying, proceed to select a district engineer and with him to examine the lands and file a preliminary report, called for by Section 1379-16. A new departure is made in the law, which provides that this report shall be submitted to the Chief Engineer, who is a state official. The College of Agriculture must also report as to the quality of the soil. On the hearing of this report and a verdict in favor of the district its greatest troubles are over. What is left to be done is more ministerial than judicial.

(*Jacobi et al vs. Kruen et al,* 160 Wis. 345.)

Third—If the preliminary report is confirmed the commissioners proceed to lay out the district; cause surveys of prospective ditches to be made; assess the lands for benefits and damages and for cost of construction. Their report must also be submitted to the Chief Engineer. (Section 1379-18.) On the hearing of this report the taxes and benefits are determined and thereafter bonds are issued and drains and ditches constructed.

The writer has become convinced, after twenty years of association with drainage matters, that some radical step should be taken to withdraw all drainage proceedings from the hands of private persons and either vest the handling of same in a state drainage commission, to whom should be presented all petitions for drainage, and who should supervise, lay out and make the necessary reports, or the state itself should take over the draining of our swamp lands, and assess the owners for the cost of the improvement as is done with the irrigated lands in the western states.

Drainage under private control has been experimental, costly and unsatisfactory. Land promoters would enter certain swamp

areas, buy up or obtain control of large tracts of lands, thus giving them the necessary majority of lands within the district and petition for the formation of a drainage district. In some instances waste lands not worth draining would be included. Engineers would be selected who were incompetent. Commissioners would be unfamiliar with the requirements of drainage and drainage ditches. As a consequence many drainage districts have ditches with insufficient outlets. In others the ditches were so shallow that in a few years they would fill up or have to be re-dug. Issue after issue of bonds were made until today in some districts a great proportion of drainage taxes are unpaid, thus causing a loss to both bondsmen and owners.

In spite of these facts drainage laws are being constantly changed to render more easy the organization of districts and more difficult for an individual land owner to contest the same.

By this the writer does not mean to say that all drainage districts in the state are not successful and that all swamp lands are not worth draining. The question of drainage depends on the locality of the swamp, the quality of the soil and the demand that exists for lands in the vicinity of the district. Low lands in Rock and Dane Counties might warrant the organization of a district, while certain sections of land in other counties might not warrant it. Although the drains and ditches in several districts have been constructed for nearly twenty years, a very small proportion of the lands are now improved. In addition, that part that has been developed has cost as much to improve as an improved farm would cost.

As I stated before, each year the legislature has been rendering more easy the organization of districts and taking from the individual some chance of successful contest of the same. For example, up to 1919 a property owner had his right to have the question of benefits to his lands by reason of the construction of the drains and ditches of such district, passed upon by a jury. In my experience, the jury being men living in the county where said districts were organized, and familiar with the land, have consistently refused to assess benefits up to the amount placed upon same by the commissioners. At one time in Juneau County twenty cases were set for trial where property owners objected to amounts assessed against their lands for benefits. The juries reduced the amounts in each contest to about one-sixth of their

assessed benefits. The juries also had before them what other similar lands in the district were assessed for construction. In the other parts of the state juries seem to act the same way.

(See *Ward vs. Babcock,* 162 Wis. 539.)

By the law of 1919 the right to have a jury pass upon the question of benefits and damages has been taken away and drainage proceedings are now proceedings in equity to be heard before the court.

There is one change that the 1919 law makes, which, if a little broader in scope, would be of great benefit to individual property owners in a district. It provides that the Chief Engineer, a state official, shall have submitted to him the preliminary report of the commissioners, who shall return same with his approval or disapproval within ten days. If this law should require that the Chief Engineer must examine the lands and report whether or not a district should be formed, it would probably result in fewer drainage districts being established for experimental purposes at the expense of unwilling property owners.

Although the past and present method of administering the drainage law has been a fruitful source of income to many attorneys, the writer believes that those who have so benefited would be foremost in sponsoring a law remedying the existing defects. A law should be enacted establishing a drainage board of commissioners to whom all petitions for drainage should be submitted.

Drainage lands so differ in character, quality of soil, and feasibility of drainage that only an expert, utterly unbiased and uninterested in the buying and selling of said land, can be able to determine whether the land lends itself to drainage; whether when drained will become productive; whether the proposed district is in a neighborhood which demands that the lands be brought into the market; and if drained would bring more than the cost of drainage. Under the change suggested, the basic questions preliminary to the establishment of a drainage district would be fairly determined by an unbiased board, who would familiarize itself with local conditions and would result in saving hardship, preserving property and elimination of the great waste of the taxpayers' money that has been the rule in the past.